Supreme Court, U.S.
FILED
JUN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1886

In The

Supreme Court of the United States

October Term, 1988

JOHNNIE GILBERT, *et al.*,

Petitioners,

vs.

CITY OF LITTLE ROCK, *et al.*,

Respondents.

On The Petition For Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARK STODOLA*
City Attorney
EDWARD G. ADCOCK
Assistant City Attorney
Room 310, City Hall
Little Rock, Arkansas 72201
(501) 371-4527

Counsel for Respondents

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I

WHETHER, IN A CIVIL RIGHTS CASE WHEREIN A PREVAILING PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 706 OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 OR THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, ABSENT EXPLICIT STATUTORY OR CONTRACTUAL AUTHORIZATION FOR THE TAXATION OF A LITIGANT'S WITNESSES AS COSTS, FEDERAL COURTS ARE BOUND BY THE LIMITATIONS SET OUT IN 28 U.S.C. § 1821 AND § 1920.

II

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY INTERPRETED THIS COURT'S MANDATE IN *CRAWFORD FITTING COMPANY V J.T. GIBBONS, INC.* AND WHETHER THE EIGHTH CIRCUIT'S DECISION IN THIS MATTER IS CONSISTENT WITH THE POST-*CRAWFORD* DECISIONS OF THE OTHER CIRCUIT COURTS OF APPEAL.

III

WHETHER CONGRESS'S USE OF THE PHRASE "REASONABLE ATTORNEY'S FEE AS PART OF THE COSTS" IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 CONSTITUTES EXPLICIT STATUTORY AUTHORITY FOR THE TAXATION OF EXPERT WITNESS FEES AGAINST A NON-PREVAILING DEFENDANT IN A CIVIL RIGHTS CASE.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Reasons for Denying the Writ	2
Statement of the Case	3
Statutory Provisions Involved	4
Argument	5
Conclusion	17

TABLE OF AUTHORITIES

Page

CASES:

Crawford Fittings Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987) ..... *passim*

Boring v. Kozakiewicz, 833 F.2d 468 (3rd Cir. 1987) 6

Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983) 10

International Woodworkers of America v. Champion International Corp., 790 F.2d 1174 (5th Cir. 1986) 9, 10, 16

Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987) 10

Glenn v. General Motors Corp., 841 F.2d 1567 (11th Cir. 1988) 10, 12

Sapanajin v. Gunter, 857 F.2d 463 (8th Cir. 1988) 12

Sevigny v. Dicksey, 846 F.2d 953 (9th Cir. 1988) 6

Black Grievance Committee v. Philadelphia Electric Co., 47 FEP Cases 215 (E.D. Pa. 1988) 12

ECOS, Inc. v. Brinegar, 671 F. Supp. 381 (M.D. N.C. 1987) 6

United States v. Yonkers Board of Education, 118 F.R.D. 326 (S.D.N.Y. 1987) 12

STATUTES:

Rule 54(d), Federal Rules of Civil Procedure .. 4, 13, 14

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1821 ..... *passim*

28 U.S.C. § 1920 ..... *passim*

29 U.S.C. § 216(b) 11

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1973*l*(e) 10, 11
42 U.S.C. § 1988 ..... *passim*
42 U.S.C. § 2000e-5(K) ..... *passim*

MISCELLANEOUS:

122 Cong. Rec. 35123 (1976) 15
S. Rep. No. 1011, 94th Cong. 2nd Sess., reprinted in U.S. Code Cong. & Adm. News at p. 5913 16

No. 88-1886

In The

Supreme Court of the United States

October Term, 1988

JOHNNIE GILBERT, *et al.*,

Petitioners,

vs.

CITY OF LITTLE ROCK, *et al.*,

Respondents.

On The Petition For Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, City of Little Rock, Arkansas, et al., respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The pertinent opinions below are included in the Appendix. The Memorandum Opinion of the District

Court limiting Petitioners to recovery of $30.00 per day of testimony for out-of-pocket expert witness fees is included in the Appendix, pages D-1 through D-12. *Gilbert v. City of Little Rock*, No. LR-C-78-340, slip op. (E.D. Ark. Aug. 7, 1987) (order), *citing*, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). The decision of the United States Court of Appeals for the Eighth Circuit, sitting *en banc*, affirming the District Court, is also included in the appendix, pages A-1 and A-2. *Gilbert v. City of Little Rock*, 867 F.2d 1062 (8th Cir. 1989) (*en banc*). The panel decision of the United States Court of Appeals for the Eighth Circuit addressing the other issues on appeal is also included in the Appendix, pages B-1 through B-11. *Gilbert v. City of Little Rock*, 862 F.2d 1063 (8th Cir. 1989).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari should be denied for the simple reason that the decision of the United States Court of Appeals is entirely consistent with the six-member majority's opinion in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494 (1987). There is no conflict among the circuits. Virtually all post-*Crawford* decisions of the circuit courts are consistent in applying the clear mandate of *Crawford*.

STATEMENT OF THE CASE

This case, first filed in 1978, has a long and tortured history, most of which is irrelevant for purposes of this appeal. On August 8, 1986 the United States Court of Appeals for the Eighth Circuit found that the oral interview component in the promotional process for the rank of sergeant at the Little Rock Police Department had a discriminatory impact upon black applicants for promotion in the years 1978 and 1979. *Gilbert v. City of Little Rock*, 799 F.2d 1210 (8th Cir. 1986). The Board of Directors of the City of Little Rock decided not to seek a Writ of Certiorari. Subsequently, upon issuance of the mandate from the Eighth Circuit, pursuant to the cost-shifting provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(K), and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, petitioners sought slightly in excess of $350,000.00 in fees and costs, of which $93,940.69 was for expert witness fees. The District Court, citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987), ruled that Petitioners' request for expert witness expenses was governed by the traditional cost-shifting provisions of Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1821 and § 1920 and, hence, that Petitioners were limited to recovery of the $30.00-per-day-of-testimony maximum contained in § 1821. *Gilbert v. City of Little Rock*, LR-C-78-340, slip op. (E.D. Ark. Aug. 7, 1987). Appendix at pages D-1 through D-12. The United States Court of Appeals for the Eighth Circuit, sitting *en banc*, affirmed by the vote of an equally divided Court. *Gilbert v. City of Little Rock*, 867 F.2d 1062 (8th Cir. 1989). Appendix at pages A-1 and A-2.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(K) provides in pertinent part:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . .

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Rule 54(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs;

28 U.S.C. § 1821(b) provides in pertinent part:

> A witness shall be paid an attendance fee of $30 per day for each day's attendance.

28 U.S.C. § 1920 provides in pertinent part:

> A judge or clerk of any Court of the United States may tax as costs the following: . . . (3) Fees and disbursements for printing and witnesses.

ARGUMENT

Petitioner's entire argument is premised upon two incorrect assumptions. First, they allege that denial of the Writ in this case will "result in the destruction of the law's intent under the Civil Rights Attorney's Fees Awards Act. . . ." Petition at page 5 (Hereafter "Pet. at ___"). Secondly, they say that there is "disagreement among the various circuits" as to the correct application of this Court's opinion in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). *Id.* Both premises are incorrect. The truth of the matter is that the Eighth Circuit's holding in this case is compelled by the plain language of *Crawford*. *See*, Subsection I, below. *Crawford* is entirely consistent with the intent of Congress. *See*, Subsection III, below. And, with two minor exceptions at the district court level, all post-*Crawford* decisions have consistently and correctly followed this Court's direction. *See*, Subsection II, below.

I. IN A CIVIL RIGHTS CASE WHEREIN A PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 706 OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 OR THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, ABSENT EXPLICIT STATUTORY OR CONTRACTUAL AUTHORIZATION FOR THE TAXATION OF A LITIGANT'S WITNESSES AS COSTS, FEDERAL COURTS ARE BOUND BY THE LIMITATIONS SET OUT IN 28 U.S.C. § 1821 AND § 1920.

When reduced to its essence, Petitioner's basic argument is simple. They simply refuse to acknowledge that the plain language of the *Crawford* majority applies to a civil rights case. Instead, they focus upon the fact that

this Court has not specifically refused to allow taxation of expert witness fees as costs pursuant to the cost-shifting provisions of 42 U.S.C. §§ 1988 and 2000e-5(K). They say:

> Although the Supreme Court has construed 54 (d) as not granting the authority to go beyond the $30 a day limits of § 1920 and § 1821, the Attorney's Fees Award Act 42 USC (§ 1988) has not been so interpreted. Likewise, Title VII 42 USC § 2000e-5(K) has not been interpreted to place limits on expert witness expense.

Pet. at 5. This is incorrect. Several district and circuit courts have, applying the clear teaching of *Crawford*, refused to tax expert witness fees against non-prevailing civil rights defendants. Indeed, three of the five cases touted on Page 8 of the Petition as illustrative of the courts' post-*Crawford* treatment of this issue specifically refuse to tax expert witness fees under § 1988. *Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3rd Cir. 1987), *citing Crawford*, "A prevailing party in a civil rights case is not entitled to tax such fees as costs."; *Sevigny v. Dicksey*, 846 F.2d 953, 959 (9th Cir. 1988) " . . . § 1988 does not provide statutory authority for the awarding of compensation for non-legal experts."; and, *ECOS, Inc. v. Brinegar*, 671 F. Supp. 381, 404 n.12 (M.D. N.C. 1987) "The most recent Supreme Court case on fees for experts supports the decision in the present case [i.e., not to allow taxation of such fees]. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.* . . . the Court held that courts are bound by the limitations set out in 18 U.S.C. § 1821 and § 1920 ($30-per-day limit) when taxing expert witness fees as costs against a losing party. Although the opinion does not specifically address 42 U.S.C. § 1988, it is persuasive authority in this case."

In point of fact, *Crawford* is more than just "persuasive authority." The plain language of the six-member *Crawford* majority opinion compels the result reached by the trial judge and the Eighth Circuit in the case at bar. The *Crawford* ruling is capsuled in the following passage:

> We hold that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witnesses as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920.

Crawford, supra, 482 U.S. at ___, 107 S.Ct. at 2499. The language employed by the *Crawford* majority is clear and unequivocal. Respondents take it to mean what it says. Absent "explicit statutory or contractual authorization" federal courts are not empowered to tax expert witness fees against a non-prevailing defendant in excess of those limitations imposed by 28 U.S.C. § 1821 and § 1920.

At this point it is probably as important to take note of what the *Crawford* majority did *not* do. The Court did not, for example, set aside civil rights cases for special treatment. The Court did not say – or even imply – that the words "costs" or "attorney's fees" are to assume anything other than their ordinary, plain meaning in the civil rights context. And, most importantly, the Court did not say – or even imply – that vague, indirect inferences gleaned from an act's legislative history will, in the civil rights context, substitute for explicit statutory authorization for the taxation of expert witness fees.

In this case Petitioners sought an award of fees and costs pursuant to the cost-shifting provisions of Title VII, 42 U.S.C. § 2000e-5(K), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. (Hereafter

"§ 2000e-5(K)" and "§ 1988", respectively). The simple, yet inescapable, fact of the matter is that neither statute explicitly authorizes the taxation of expert witness fees. Using identical language, both say simply that "the court, in its discretion, may allow the prevailing party . . . a reasonable *attorney's* fee as part of the costs." *Id.* (emphasis added). That being the case, both the trial judge and the Eighth Circuit, having no explicit statutory authorization for the taxation of expert witness fees upon which to rely, in applying the plain holding of *Crawford* found themselves bound by the limitations contained in the traditional cost-shifting provisions of Rule 54(d), 28 U.S.C. § 1821 and § 1920. *Crawford* allows no other result. The Petition for a Writ of Certiorari should be denied for this reason alone.

II. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY INTERPRETED THIS COURT'S MANDATE IN *CRAWFORD FITTING CO. V. J.T. GIBBONS, INC.* AND IN SO DOING REMAINED CONSISTENT WITH THE POST-*CRAWFORD* DECISIONS OF THE OTHER CIRCUIT COURTS OF APPEAL.

As noted in Subsection I, above, the result reached by the district court and the Eighth Circuit in this matter was compelled by the simple fact that neither § 1988 nor § 2000e-5(k) explicitly authorizes the taxation of expert witness fees. Petitioners seek to avoid this obvious fact by pointing to Mr. Justice Blackmun's *Crawford* concurrence, arguing that this result is not compelled for the sole reason that § 1988 was "not at issue in *Crawford*." Pet. at 6, See, *Crawford, supra,* 482 U.S. at ___, 107 S.Ct. at 2499 (Blackmun, J., concurring); See also, *Id.*, 482 U.S. at ___, 107 S.Ct. at 2499-2502 (Marshall, J., dissenting) (joined by

Brennan, J.). Respondents offer two responses. First, the simple fact of the matter is that the *Crawford* majority opinion contains no such delimiting distinction. On its face, it provides not even a hint that § 1988 or § 2000e-5(K) in particular or civil rights cases in general remain unaffected by its seemingly all-encompassing rule. Second, it would appear that, in fact, § 1988 *was* at issue in *Crawford*. Certainly, the Fifth Circuit thought so. It said:

> The statutes applicable here, 42 U.S.C. § 1988 and § 2000e-5(K), provide for the award for attorneys' fees to prevailing parties, but make no mention of excess expert witness fees.

International Woodworkers of America v. Champion International Corporation, 790 F.2d 1174, 1181 (5th Cir. 1986). Even the oft-quoted *Woodworkers* concurrence/dissent recognized that § 1988 was at the root of the issue, noting that "in *Woodworkers*, a . . . prevailing party in an employment discrimination suit requests expert witness fees as a litigation expense incidental to an award of attorney's fees authorized by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988." *Id.*, 790 F.2d at 1181 (Rubin, J., concurring in the result) (joined by Wisdom, Johnson and Williams, JJ).

In summary, the truth of the matter is that civil rights cases are not excluded, either explicitly or by implication, from the scope of the *Crawford* majority opinion. The rule of *Crawford* governs an application for expert witness fees as litigation expenses under § 1988 and § 2000e-5(K), just as it governs such applications in other cost-shifting contexts. And, because § 1988 and § 2000e-5(K) contain no explicit authorization for the taxation of expert witness

fees in excess of the limits imposed by 28 U.S.C. § 1821 and § 1920, the plain rule of *Crawford* compels the result reached by the trial judge and the Eighth Circuit in this case.

Failing in their effort to distinguish *Crawford*, Petitioners fall back upon the old conflict-among-the-circuits shibboleth, when, in fact, no such conflict exists. See, Pet. at 6-8. In support, they point to the *Woodworkers* dissent and *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir. 1983). They fail to note, however, that *Dowdell* and the cases cited in the *Woodworkers* dissent are all pre-*Crawford*. They do not and, with one non-notable exception, *see*, discussion below, cannot point to a single post-*Crawford* circuit court case wherein expert witness fees were taxed against a non-prevailing civil rights defendant pursuant to § 2000e-5(K) or § 1988. The truth is that the circuit courts of appeal have consistently interpreted *Crawford* to preclude taxation of expert witness fees absent explicit statutory or contractual authorization.

Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987) and *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988) are illustrative. In *Leroy*, Plaintiffs attacked the constitutionality of the City of Houston's at-large method of electing the Houston City Council. They won and, hence, were "prevailing parties" within the meaning of the cost-shifting provision of the Voting Rights Act, 42 U.S.C. § 1973*l*(e). The relevant provision of the Voting Rights Act is, in pertinent part, virtually identical to the cost-shifting provisions of 42 U.S.C. § 1988 and § 2000e-5(K). It says:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendments, the Court, in its discretion, may allow the

> prevailing party . . . a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1973*l*(e) (Emphasis added). The Fifth Circuit, citing *Crawford*, refused to tax excess expert witness fees. It said:

> The second recent controlling development is the Court's determination that expert witness fees in excess of standard per diem and mileage costs may not be allowed as part of the costs to prevailing parties under federal fee-shifting statutes unless the statute explicitly so provides. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, . . . Although that case expressly considered whether Fed.R.Civ. Proc. 54(d) could, in an antitrust case, override the statutory limit on witness fees, the Court's general reasoning leaves us no room to construe the Voting Rights Act provision here otherwise.

Id. 431 F.2d at 584. In *Glenn* the Eleventh Circuit (which, incidentally, is the same court which decided the *City of Apopka* case upon which Petitioners rely) did much the same thing. The Court was faced with a prevailing plaintiff's petition for taxation of expert witness fees under the cost-shifting provision of the Equal Pay Act, 29 U.S.C. § 216(b). In pertinent part, the Act says:

> The Court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiff's, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Id. While the cost-shifting provision of the Equal Pay Act varies slightly in language, it shares one important characteristic with the cost-shifting provisions of Title VII and the Civil Rights Attorney's Fees Awards Act. It too fails to explicitly provide for the taxation of expert witness fees.

The Eleventh Circuit found this omission to be fatal to Mr. Glenn's cause. It said:

> We hold that the broad language in *Crawford Fitting* does not permit a distinction based upon whether or not the award is made under a fee-shifting statute. The broad language in *Crawford Fitting* indicates that, although a statute may shift *attorney* fees, the statute does not operate to shift *witness* fees unless the statute refers explicitly to witness fees.

Glenn, supra, 841 F.2d at 1575 (Emphasis in original). Clearly, both the Fifth and Eleventh Circuits have correctly applied the plain meaning of this Court's *Crawford* holding.

The one non-notable exception to the otherwise-unanimous circuit court treatment of the plain rule of *Crawford* is *Sapanajin v. Gunter,* 857 F.2d 463 (8th Cir. 1988). Though wrongly decided, *Sapanajin* is of no import for the simple reason that it is pre-*Gilbert* and, hence, not the Eighth Circuit's latest statement on the issue. *Gilbert,* decided some four months after *Sapanajin,* is now the "law of the circuit."

Petitioners also cite two U.S. District Court cases in their attempt to generate a "split among the circuits." *Black Grievance Committee v. Philadelphia Electric Company,* 47 FEP Cases 215 (E. D. Pa. 1988) and *United States v. Yonkers Board of Education,* 118 F.R.D. 326 (S.D. N.Y. 1987). Neither is persuasive. To begin with, both are wrongly decided, emphasizing what the district judges *want* Title VII and § 1988 to say rather than the plain language of *Crawford* and the statutes. And one of them, *Black Grievance Committee,* is 180° opposite the law of its circuit. See, *Boring, supra.*

In summary, there is no conflict among the circuits justifying the granting of a Writ of Certiorari in this case. The circuits have consistently applied the plain meaning of *Crawford*.

III. CONGRESS'S USE OF THE PHRASE "REASONABLE ATTORNEY'S FEE AS PART OF THE COSTS" IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 DOES NOT CONSTITUTE EXPLICIT STATUTORY AUTHORITY FOR THE TAXATION OF EXPERT WITNESS FEES AGAINST A NON-PREVAILING DEFENDANT IN A CIVIL RIGHTS CASE.

Petitioners completely misconstrue one passage in Crawford. They say:

> The *Crawford* decision states "without plain evidence of Congressional intent" to supersede § 1821, 1920, and § 54(d), the court should not exceed the limitations therein. Therefore, the *Crawford* decision does not preclude awarding expert witness expense in a situation where Congress' intention to allow expert witness expense is clear.

Pet. at 6. It is true that the *Crawford* majority opinion says "[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to supersede that section ignores our long-standing practice of construing statutes *in pari materia*." *Crawford, supra*, 482 U.S. at ___, 107 S.Ct. at 2499. Petitioners are correct in their assumption that the limitations contained in § 1821 and § 1920 will not control in the event Congress plainly demonstrates its intent to tax excess expert witness fees. What Petitioners fail to grasp, however, is the equally

obvious fact that the requisite "plain evidence" of congressional intent should be evident from the face of the statute – hence, the requirement of "explicit statutory authority." Indeed, a mere two sentences above the above-quoted passage the Court indicated that "[w]e will not lightly infer that Congress has repealed §§ 1920 and 1821 either through Rule 54(d) *or any other provision not referring explicitly to witness fees.*" *Id.* (Emphasis added).

Petitioners attempt to avoid the obvious ramifications of this fact by arguing that the legislative history of the Fees Act evidences the requisite congressional intent, this despite the fact that such intent did not manifest itself on the face of the statute. It is true that, from time to time, there does appear in the legislative history statements to the effect that, if private citizens are to enforce civil rights statutes, they must be able to recover what it costs them to vindicate these rights in court. Petitioners ignore, however, the fact that virtually all of these oblique references to "costs" or "expenses" occur within the context of a discussion of attorney's fees. The remarks of Representative Drinan referred to on Page No. 9 of the Petition are typical. The passage to which Petitioners refer reads in its entirety as follows:

> . . . [T]he bill permits the recovery only of a 'reasonable' *attorney fee.* Here too the courts have identified a number of factors to determine the reasonableness of awards. In Johnson versus Georgia Highway Express, for example, the court enumerated 12 factors to be considered, including the time and labor required, the novelty and difficulty of the questions, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any. These evolving standards should

> provide sufficient guidance to the courts in construing this bill which uses the same term. I should add that the phrase 'attorney's fee' would include the values of the legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation.

122 Cong. Rec. 35123 (1976) (Emphasis added). Clearly, the thrust of Representative Drinan's remarks concerned attorney's fees. The $93,000.00 in expert witness fees at issue in this case are a far cry from "incidental and necessary expenses" incurred in the provision of *"legal services . . .* of counsel."

Petitioners also do not mention that, throughout the entire legislative history of § 1988, there is not one explicit reference to the taxation of expert witness fees. Not a single senator or representative is recorded as having said that the Act would have the practical effect of causing non-prevailing defendants to bear the costs of prevailing plaintiffs' out-of-pocket expert witness expenses. The simple truth of the matter is that, had Congress intended for § 1988 to result in the taxation of expert witness fees, someone would have said so during the long and exhaustive debate. None did, and that fact alone dooms Petitioners' argument that the legislative history provides the "plain evidence" of congressional intent sufficient to satisfy the rule of *Crawford*.

Lacking direct evidence, Petitioners attempt to create an inference of congressional intent. They cite the following passage from the official legislative history of the Act:

> It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in

> other types of equally complex Federal litigation. . . . The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. § 9444 (C.D. Cal. 1974); and, *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter'.

S. Rep. No. 1011, 94th Cong. 2nd Sess., reprinted in 1976 U.S. Code Cong. & Adm. News at p. 5913. See, Petition at 9-10. In essence, Petitioners would have this Court blithely assume that because a district judge in California allowed taxation of $1,500.00 in expert witness fees in *Davis, supra,* and because Congress mentioned *Davis* as illustrative of the treatment of attorney's fees, then, *ipso facto,* Congress *really intended* for § 1988 to provide for the taxation of expert witness fees, this despite the fact that nobody ever said as much. This is patently absurd. Oblique inferences do not constitute explicit statutory authorization.

The obvious fact of the matter is that if Congress had intended to tax expert witness fees it would have been obvious. It knows how to do so as evidenced by the fact that twenty-eight statutes expressly provide for the taxation of expert witness fees. *Woodworkers, supra,* 790 F.2d at 1179 n.7.

In summary, Congress's use of the phrase "reasonable attorney's fee as a part of the costs" cannot reasonably be construed to explicitly authorize taxation of expert witness fees. Such intent must be plainly evidenced on the face of the statute. The legislative history of § 1988 does not provide the requisite plain evidence of congressional intent to override the traditional cost-shifting provisions of § 1821 and § 1920.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MARK STODOLA*
City Attorney
EDWARD G. ADCOCK
Assistant City Attorney
City Hall – Room 310
Little Rock, Arkansas 72201
(501) 758-9073

Counsel for Respondents

*Counsel of Record